UNAPPROVED AND SUBJECT TO CHANGE CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION MINUTES OF THE MEETING, Public Session

October 4, 2002

<u>Call to order:</u> Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:41 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox, and Gordana Swanson were present.

Item #1. Approval of the Minutes of the September 5, 2002, Commission Meeting.

Commissioner Swanson moved that the minutes be approved.

Commissioner Knox seconded the motion.

There being no objection the minutes were approved.

Item #2. Public Comment

There was no public comment.

<u>Item #3. Proposition 34 Regulations: Adoption of Amended Regulation 18531.7 -</u> Payments for Member Communications.

Staff distributed four handouts pertaining to proposed regulation 18531.7 to the Commission and made them available to the public. They included revised subdivisions (a)(2) and (f), a proposal by Commissioner Downey for subdivision (a) language, and two pages of examples of the completed form 460.

Staff Counsel Scott Tocher explained that exhibit 2 of the original agenda materials was the petitioner's proposed language for the regulation and, in small caps, language added by staff providing other options for the Commission's consideration.

Mr. Tocher presented the first decision in exhibit 2, relating to payments from a committee's sponsored PAC. The petition proposed that payments from a sponsored PAC used for communications to the sponsoring organization's members be covered under the exemption by amending subdivisions (a) and (d) of the regulation. Staff recommended that the Commission accept the purpose of the petitioner's amendments, but believed that it could be better accomplished with the amendments suggested in subdivision (d) of exhibit 2 without amending subdivision (a). He believed that "or its sponsored committee" should be included on both lines 6 and 7 of that subdivision.

In response to a question, Mr. Tocher stated that no objections to including that language had been received from the public.

There was no objection from the Commission to including the proposed language in both places of subdivision (d).

Commissioner Downey questioned why staff recommended not including the "or its sponsored committee" language in subdivision (a).

Ms. Menchaca responded that it could be confusing since subdivision (a)(1) defines "an organization" to include the sponsored committee. However, subdivision (d) is a more specific provision relating to third-party payments, and the language would be helpful there.

Chairman Getman observed that subdivision (a) defines "organization making the payment," not "organization." A sponsored committee can be the organization making the payment to the members of the sponsoring organization. She suggested that the wording proposed by Commissioner Downey might be better.

Ms. Menchaca stated that staff had no objection to Commissioner Downey's proposed language. It added the reference to "publication, dissemination or communication" and "like material, written or spoken," which may be helpful to the public.

In response to a question, Commissioner Downey stated that his proposed language intended to clarify that "newsletters, letters and flyers" referred to payments for those items. His proposal also clarified that expenses could relate to written or spoken materials, and that they must relate to supporting or opposing a candidate or a ballot measure.

Commissioner Knox supported Commissioner Downey's proposed language, and suggested that the word "its" be changed to "the organization's" in both places where it appears in Commissioner Downey's proposal. He explained that the Commission wanted to say that the sponsored committee could pay for communications made to members of the sponsoring organization. His suggested change should make clear that the sponsored committee can pay for communications to the sponsoring organization's members. Additionally, if the sponsored committee is paying for communications to the sponsored committee's members, then the sponsored committee is "the organization," which is referenced in the first place.

There was no objection to Commissioner Downey's proposed language with Commissioner Knox's amendments.

Chairman Getman noted that the same issue arises in subdivision (d).

Commissioner Knox stated that the language "Government Code section 85312 or" should be deleted from the first line of the proposal because otherwise it might erroneously suggest that the regulation might be paramount to the statute. He supported the rest of the language of the proposal.

Commissioner Downey agreed.

In response to a comment, Mr. Tocher explained that staff recommended inclusion of the language "or its sponsored committee" in both decision points of subdivision (d).

Commissioner Knox agreed that it should be kept in both places.

Mr. Tocher clarified that the Commission also agreed to include the "sponsored committee" reference in Commissioner Downey's draft of subdivision (a).

Chairman Getman agreed.

Mr. Tocher explained that Decision 2 concerns the definition of "member." Petitioners suggested that the scope of that definition be broadened to include organizations, which staff had inadvertently excluded in the prior language. He noted that staff endorsed the proposed changes on lines 17 and 18 of exhibit 2 page 1. Staff endorsed the language on line 23, clarifying that a local union member would also be considered a member of the national union or federation.

Mr. Tocher explained that staff did not endorse the change on line 22, which set aside a complete and separate qualification of membership based solely on the payment of membership dues. Staff believed that the Commission properly decided not to make the regulation so broad because it would include purely commercial settings. He explained that members of the California League of Conservation Voters (CLCV) had no participation in the election of officers or Board members or policy control, but did pay annual dues. In order to prevent purely commercial concerns from coming within the ambit of the regulation, subdivision (a)(2) was revised to provide that the payment of membership dues, when connected with an organization that is tax exempt under 501(c), would be sufficient for qualification as a membership organization. Staff believed that it would draw the line to include purely membership, dues-paying organizations without including purely commercial organizations.

There was no objection from the Commission to excluding purely commercial enterprises.

In response to questions, Mr. Tocher stated that staff intended the tax-exempt organization language as a qualification to the "dues payment" clause. Including that tax-exempt status requirement with the other definitions of "member" would be unnecessary and might narrow the other qualifiers, including the "articles and bylaws" provision. If tax-exemption were tied to other aspects of that definition, it could result in undoing the provisions that have been suggested by the petitioners.

Commissioner Knox asked whether the Chairman was suggesting that membership should be qualified by using the tax-exempt status of an organization as a filter.

Chairman Getman responded that a qualification providing a requirement for tax-exempt status in just one small part of the regulation would, by implication, suggest that it does not need to be in any other part of the regulation. She did not know whether articles or bylaws of a corporation like Costco actually designate members.

Commissioner Knox responded that, presuming that the articles or bylaws make that designation, the regulation would exempt members who are members simply because they are customers, drawing a distinction between customers who do not enjoy any protection under the statute and customers who are called "members" like Costco.

Chairman Getman suggested that it was implemented by assuming that they had no right to vote on changes to the articles or bylaws.

Commissioner Knox agreed, noting that, if the members did have those voting rights, then the statute intended to include them in the definition.

Chairman Getman agreed.

In response to a question, Mr. Tocher stated that a food co-op could be included in the definition because they often allow the member customers voting rights.

Commissioner Downey noted that CLCV was a nonprofit organization with several PACs. "Organization" was defined to include PAC's, which do not have a separate qualification as a tax-exempt organization under 501(c). He asked staff for an analysis if the PAC of CLCV spends money to communicate with the dues-paying members of CLCV.

Mr. Tocher responded that staff would examine whether the sponsoring organization is a tax-exempt organization. Once that was established, and assuming that there were membership dues-paying members of the organization, they would be included. A payment from the sponsored PAC could be used to pay for a communication by the sponsoring organization (the CLCV).

Commissioner Downey suggested that the language should include "sponsoring organization."

Commissioner Knox responded that it had already been addressed under subdivision (a). He noted that it was exactly the kind of confusion the Commission was trying to eliminate with the changes to subdivisions (a) and (d).

Mr. Tocher agreed.

Commissioner Downey clarified that substituting "the organization" in place of the word "its" was meant to accomplish that.

Commissioner Knox stated that, given the changes made in (a) and (d), he saw no way to narrowly interpret subdivision (2).

Chairman Getman noted that the federal rules include a safety clause, and the FPPC rule does not. She read from the federal regulations a provision that would allow the FEC to determine, on a case-by-case basis, that under certain circumstances they can decide whether organizations qualify.

Mr. Tocher stated that staff did not know whether that option had ever been utilized.

Chairman Getman recollected a union representative who brought to staff's attention retired union members who no longer pay dues but are still considered members of the union.

Commissioner Swanson questioned whether the Commission had to address every possible eventuality, and whether staff had some latitude to make the determinations.

Ms. Menchaca explained that the definition of "member" in the regulation, further interpreting the statute, specifies who becomes a member. Their advice is limited by the regulation, and if the regulation did not address a particular situation, staff would have to ask the Commission to modify the regulation. A case-by-case analysis capability would have to be included in the regulation if the Commission wanted staff to have that authority. She stated that the FPPC once had a much more detailed provision defining "member." However, for the sake of simplicity, it was changed to recognize that the connection most relevant is the ability to vote. It was believed that the requirement of an ability to vote would capture most of the situations that needed to be addressed.

Dave Allen, from the California Teachers Association (CTA) stated that the CTA has many retired teachers who do not pay dues but are lifetime members. They do not have a right to vote in the organization. They paid regular dues prior to retirement, and then made a one-time-only lifetime dues payment after retirement.

In response to a question, Chairman Getman stated that she believed CTA was a tax-exempt organization under 501(c).

Commissioner Knox noted that the current draft would allow them to be included.

Chairman Getman stated that the language reads, "pays dues," which might imply that members must be currently paying dues. She believed that it was common for unions to have retired members who no longer pay dues.

In response to a question, Mr. Allen stated that lifetime members must pay the \$200 dues in order to be a lifetime member.

Commissioner Swanson stated that the lifetime member earned the membership by virtue of long employment prior to retirement.

Mr. Allen responded that members had the option of being lifetime members, but must pay the \$200 to do so.

Chairman Getman suggested that the language read, "pays or has paid" in order to include the retired members, if the Commission did not want to use the "safety valve" approach.

Commissioner Knox agreed with the language change. He did not support the "safety valve" approach because it would provide little guidance.

Commissioner Downey noted that alumni associations encourage lifetime memberships and are generally tax-exempt.

Mr. Tocher noted that the alumni usually have voting power in the organization.

Commissioner Knox responded that the alumni organizations elect officers.

Mr. Tocher explained that the proposed language modification would cover that situation.

Commissioner Knox stated that the CTA problem would not be resolved simply with the language modification. A person who was not a lifetime member may have been a member years earlier.

Chairman Getman responded that they must be designated in the articles or bylaws as a member.

Mr. Tocher explained that Decision 3 concerned subdivision (e) of the regulation, and the issue of whether candidates may behest payments by the organization. The Commission considered and rejected this decision at its August 2002 meeting. Staff reviewed the issue again, and believed that that the statute was intended to provide that payments for member communications made at the behest of a candidate are not contributions to the candidate or committee.

In response to a question, Mr. Tocher stated that the Commission had the option of deleting subdivision (e) entirely. Subdivision (d) outlines what is considered to be a payment, and addresses payments by third parties. Staff believed that it might be easier to delete (e). If the Commission chose to do so, it would be obvious that candidates could behest payments.

Commissioner Knox agreed with staff's analysis. Since the Commission was trying to close loopholes, rejecting some of the proposals in the petition, he suggested that subdivision (e) be left in the regulation.

In response to a question, Mr. Tocher stated that staff asserted that (e) should be left out because the regulation defines members, organizations, and what the regulation applies to. Subdivision (d) then provides exceptions to the previous provision. Subdivision (e) would allow the candidate to work with the organization on the member communications. Including the subdivision would not cause a problem, but staff thought it would simplify the regulation by leaving it out.

In response to a question, Commissioner Knox confirmed that he thought leaving subdivision (e) in the regulation would make clear that payments from third parties to an organization for communications would be considered contributions, and payments made at the behest of a candidate would not be considered contributions.

Commissioner Downey agreed.

Diane Fishburn, on behalf of the petitioners, supported leaving (e) in the regulation because it provided clarification and guidance, especially since the Commission was considering applying the regulation to local candidates and measures in proposed subdivision (f).

Tony Miller agreed that (e) should be left in as a "bright-line" test. He noted that Proposition 208 would have exempted candidate behested payments for communications. The proposed regulation would create a large loophole, but it was intended to be that way even before Proposition 208. He supported staff's recommendation.

In response to a question, Ms, Fishburn stated that the petitioner proposed the language "as provided in Government Code section 85312" in (e) to clarify that it is permitted under § 85312. She stated that the clause could be in or out of the regulation, as long as the regulation was clear.

Commissioner Downey opined that the regulation was clear and that the clause could be taken out.

Chairman Getman noted that the whole regulation was designed to interpret § 85312.

Mr. Tocher stated that Decision 4 dealt with subdivision (f) of the regulation, concerning payments from committees which are for membership communications, and the manner of reporting on the Form 460. He noted that the Commission determined at its August 2002 meeting that a committee would disclose that a payment was for a membership communication and to whom the payment was made. Additionally, the committee would have to designate the ballot measure or candidate the payment was in connection with. Those decisions were reflected in subdivision (f). The petitioners proposed, in Decision 4, that the provisions of § 84211(k)(5) be deleted, which eliminates the allocation connection to the candidate or ballot measure.

Mr. Tocher referred to the Form 460 handout, noting that the front page showed how the forms would be completed under the Commission's previous decision. The second page of the handout reflects how the same transaction would be reported under the petitioner's version of the regulation. He explained that the description of the payment under the petitioner's version would not include a connection to the ballot measure or candidate to which the expenditure related.

In response to a question, Mr. Tocher explained that the statute provides that membership communications are neither contributions nor expenditures. Since Schedule E describes expenditures and contributions, petitioners argue that no reporting needs to be done at all. As an accommodation, they agreed to report and characterize an expenditure as a membership communication, but did not believe that they have to describe the payment.

Commissioner Downey stated that, either there is statutory authority for reporting or there is not. He read § 84211(k)(5) to apply its reporting requirements only to contributions or independent expenditures. Since § 85312 provides that member communications are not contributions, those expenditures would not have to be reported. He did not believe there was statutory authority to require reporting those expenditures.

Ms. Menchaca explained that § 84211(e) grants that authority with respect to committees that already have an obligation to report, by requiring that committees disclose the balance of cash held at the beginning and the end of the reporting period. If all expenditures are not reported, the reports will not balance. The regulation would create a means to make the report balance, and the Commission could determine the level of specificity needed on that report.

In response to a question, Ms. Menchaca stated that the petitioners believe that balancing the report could still be accomplished by requiring the amount of the payment and the designation that it is a member communication on the additional reporting schedule, without describing the payment. Staff suggested that all of that information, including the description, could be included on schedule E instead of on an additional schedule, as a compromise to the issue. Providing the information would not be overly burdensome to the committee, and would be useful to the public and to staff. The information would help the Commission analyze how the regulation was working so it can ascertain whether legislative changes are needed in the future.

Chairman Getman agreed with Ms. Menchaca's policy arguments, but did not believe that the Commission had statutory authority to require reporting the payment. She noted that SB 34 amended § 85312 to specifically require that political parties report member communication payments as though they were contributions or independent expenditures.

Ms. Menchaca stated that there was no regulatory definition of a description of a payment, and staff thought this would further define subdivision (k)(4).

In response to a question, Ms. Menchaca opined that the Commission would have the authority to include the specificity in a regulation.

Commissioner Swanson believed that the purpose of the communication would be very helpful information for members of the public. She favored including the description.

Commissioner Knox stated that § 85312 was sweeping in scope, and did not believe that the Commission could get to § 84211 to require the descriptions.

Commissioner Downey noted the discrepancy of the political party reporting requirement.

The Commissioners and staff further discussed the language of § 84211, noting that SB 34 changed it to apply to "expenditures" instead of "independent expenditures".

Ms. Menchaca stated that staff believed that § 84211(e) granted authority with its provision that committees are still required to report all payments made for political purposes.

Commissioner Knox pointed out that the statute only required a bottom-line balance at the beginning and end of the period, and did not require itemization.

Commissioner Downey noted that it provided a "foot in the door."

In response to a question, Ms. Menchaca stated that no one objected to that "foot in the door."

Commissioner Knox stated that just because the regulated community was willing to provide the information the Commission is not excused from its responsibility to interpret the statute.

Commissioner Swanson asked whether it would be beneficial for enforcement purposes to have the description included.

Enforcement Chief Steve Russo stated that it would be helpful.

Commissioner Swanson questioned whether it would eliminate the need for enforcement staff to have to do additional research.

Mr. Russo agreed that it would.

Chairman Getman noted that § 84211(k)(6) included language defining "expenditure" as any individual payment for purposes of subdivisions (i), (j), and (k) only, suggesting that it may allow the Commission to require reporting of a payment for membership communications.

Commissioner Downey stated that it applies only to contributions and independent expenditures and noted that there are no contributions or independent expenditures under § 85312. After further review of subdivision § 84211(i), Commissioner Downey asked whether the expenditures of that subdivision were the same expenditures referred to in § 85312.

Commissioner Knox asked how there could be two different definitions of the word "expenditures."

Chairman Getman responded that it is commonly done. She noted that the statute provides a specific definition of "expenditure" for just one subsection of the regulation. Since no one objected to the disclosure of the payment, subsection (i) provided the Commission with statutory grounds to require that a committee report all payments. She did not agree that there were statutory grounds to make it reportable as a contribution or independent expenditure. She supported proposing a legislative change.

In response to a question, Commissioner Downey agreed with the Chairman's reading of § 84211(k)(6) as providing that, for purposes of (i), (j), and (k) only, "expenditure" means individual payments or accrued expenses, thus equating expenditures with payments. Section 85312 refers to "expenditure" and not "payments." The language has nothing to do with the exclusion or exemption provisions of § 85312.

Commissioner Knox summarized that Commissioner Downey was interpreting the term "expenditure" in § 85312 to mean something different from the term "expenditure" in § 84211.

Commissioner Downey agreed, pointing out that § 84211(k)(6) provides that it is something different for (i), (j), and (k) only.

Chairman Getman stated that it becomes problematic for staff as well as for the committees if the payments are not reported at all. This would not allow requiring that the candidate's name be identified, but it would allow the payment to be reported.

Mr. Tocher pointed out that if the payment is not reported, every committee that makes membership communications would file a document which is not balanced. That would require enforcement staff to do a lot more research to find out whether it is an error.

Chairman Getman suggested that the Commission keep the provisions of subdivision (f) requiring that the payments be reported as member communication but not requiring the identity of the candidate or measure the communication relates to. Additionally, the Commission should ask for a legislative change in the coming year which would provide that reports of payments for membership communications made by a political committee identify the candidate or measure that the communication relates to.

Mr. Tocher clarified that the Commission would support exhibit 2, subdivision (f) as proposed, including staff's recommended addition on lines 18 and 19.

Chairman Getman responded that the additional staff language was not needed because the payment was reportable in accordance with the requirements of subdivision (i).

In response to a question, Mr. Tocher stated that the references to (b), (j) and (k) would remain in the regulation. Staff would delete the language in the staff suggestion.

Commissioner Knox stated that it was a frail interpretation, but he supported it.

Commissioner Swanson was not in favor of the proposed language.

Ms. Fishburn clarified that the staff language was being deleted.

Chairman Getman agreed.

Lynda Cassady, Assistant Division Chief, Technical Assistance, advised that there was no requirement that the payment be coded on the Form 460 as a member communication, and that it could be reported as a printing expenditure.

Commissioner Downey noted that it would be to the reporter's advantage to report it as a member communication.

Chairman Getman agreed.

Commissioner Swanson questioned whether there would be no further description of the payment.

Mr. Tocher responded that the payment could be reported as a printing expenditure instead of a member communication.

Commissioner Swanson responded that she did not agree with the majority view that the description be omitted. She opposed the proposal because it did not require reporting the description of the payment.

Commissioner Downey explained that it was not a policy issue, but was a statutory language problem.

Commissioner Swanson pointed out that the General Counsel believed it to be a policy issue. She believed it should be ruled as such instead of accepting it as a statutory conflict.

Chairman Getman stated that the Commission agreed with Commissioner Swanson about the policy. However, she respectfully disagreed with the General Counsel's statutory interpretation, and believed that the statute prohibited them from requiring the description of the payment. If the Commission chose to require it, she believed it would result in a lawsuit and cost to the FPPC. She was pleased that the Commission was able to reach a compromise and not lose all of the membership communication reporting.

Commissioner Knox moved that the regulation be adopted.

Commissioner Downey asked whether a campaign donor who gives the maximum allowed to a favorite candidate could donate to a sponsoring organization earmarked for use to send a mailer to their members supporting the candidate, and whether the payment would be exempted under § 85312 from being reported.

Mr. Tocher responded that subdivision (d) would regard that instance as a payment from a third person and the payment would not be exempted from the reporting requirements.

Commissioner Downey asked whether the donor could join the organization and have the payment be exempted.

Mr. Tocher responded that once the person became a member, the payment would be exempted under § 85312. As long as the person met the organization's requirements for membership, it would be permissable.

Commissioner Downey noted that many organizations are harder to get into and that would preclude a person from joining.

Commissioner Downey asked whether the same donor would have violated the campaign contribution limits, if, instead, the donor gave a large donation to a political party and earmarked it to be given to a sponsoring organization for a member communication supporting the donor's favorite candidate.

Commissioner Knox suggested that subdivision (d) would prohibit that contribution, because the contribution would come from a third party and therefore not enjoy the exemption under § 85312.

Ms. Menchaca noted that the political party could be treated as a third party in the example.

Commissioner Downey noted that political parties had no contribution limits. Consequently, he asked whether a contribution to a political party under the hypothetical scenario described above could circumvent contribution limits.

Ms. Cassady responded that state PACs are subject to \$5,000 limit on contributions received by them.

Chairman Getman responded that the political party would be treated as a third party under the regulation and could not pay for the member communication.

Chairman Getman noted that Commissioner Knox's motion to adopt the regulation included subdivision (a) as rewritten by Commissioners Downey and Knox; the second sentence included in subparagraph (a)(2); the inclusion of the underlined words, adding "or has paid" after the word "pays" and the deletion of the words "at least annually"on line 22; excluding the language, "Government Code section 85312" and including the underlined language of subparagraph (d); the inclusion of the underlined language "not" and deletion of the other underlined language of subparagraph (e); and the inclusion of the underlined language "(1), (2), (3), (4), and (6)" but the deletion of the remainder of rest of the paragraph in subparagraph (f).

Commissioner Downey seconded the motion.

Commissioners Downey, Swanson, Knox and Chairman Getman voted "aye". The motion carried by a vote of 4-0.

The Commission adjourned for a break at 11:10 a.m.

The Commission reconvened at 11:20 a.m.

<u>Item #4. Project Proposals -- Conflict of Interest Codes and Statements of Economic Interests.</u>

Ms. Menchaca explained that staff was working on five projects relating to conflict of interest codes and statements of economic interest. She summarized the work presented in the staff memo.

Ms. Menchaca stated that staff wanted to continue working on projects A.2 and A.7, concerning streamlining advice and the code review process for more effective advice and assistance. Staff anticipated presenting regulatory language for pre-notice discussion in December 2002.

Ms. Menchaca explained that project A.5 addressed filing officer issues, and staff identified additional guidelines, including concrete timelines for notification, that would be useful for filing officers and would increase compliance in filing statements of economic interest. Staff proposed pursuing those guidelines as a legislative proposal, however, because they did not think it could

be accomplished through a regulation. Filing officer obligations and notification requirement issues were discussed by staff while they explored ways to ensure that everyone knows about their obligation to file statements of economic interest. The focus of the proposal was the filing official and not the duties and obligations of the individuals who have the filing obligation. Staff anticipated that they would engage in discussions about the employee as well as the public official in this project.

Chairman Getman stated that this was an important policy issue for the Commission. If the Commission decided to pursue legislation, there would be a benefit to imposing duties on filing officers requiring them to notify employees of their filing obligations within a certain time frame. She noted that having no timelines created problems. Once the Commission begins this process, the question of whether the individual should be held liable for not filing when the filing officer has not advised the employee of their obligations will have to be addressed.

Chairman Getman explained that some positions obviously have to file. However, outside consultants may not know that there is any reason for them to file unless told by the filing officer. She suggested the Commission debate where the liability would fall in those cases.

Ms. Menchaca suggested that the Commission not pursue a legislative proposal, and instead review staff's work to analyze how the issues could be addressed, since the work so far has focused on the filing officer and not the employee. The employee aspect would need further work by the staff.

Commissioner Knox asked how the filing officer knows when there are new employees, noting the DWR was fined the previous year after a very confusing filing violation. He was concerned about how to treat a case wherein a filing clerk was designated as the filing officer because the duties seemed so ministerial, and, because the clerk was not "in the loop," was not told about the new employees and, consequently, did not fulfill the filing officer duties.

Commissioner Swanson questioned whether the "filing officer" meant the organization.

Chairman Getman stated that the Commission fined DWR as the filing officer because there was no one individual who was designated as the filing officer. The proposal should focus on making sure that there is an individual with a statutory obligation and liability in each agency to ensure that, even in the middle of chaos, the filing obligations are taken care of. She believed that it would be hard to hold the individual liable when then are not told of their obligation, but "I didn't know," is a common defense and she cautioned against allowing it.

Ms. Menchaca noted other creative ways that persons with filing obligations try to create ambiguity regarding the reasons why their reports were not filed.

Chairman Getman agreed that the issue needed more study, but believed that it should be done in the public hearing process. She suggested that the Commission begin a policy discussion debating a legislative proposal addressing who should be liable in these situations and what the liabilities should be. There was currently no guidance in the statutes or the regulations and she encouraged staff to study it and bring it to the Commission.

Ms. Menchaca noted that much of the research was collected from the Technical Assistance Division's surveys conducted during their outreach programs. They could hold an IP meeting on the subject matter in general, and include in that a discussion about the agency obligations, the filing officer obligations, and the filer obligations. Staff could look for individuals with current or prospective obligations regarding the issues while conducting outreach programs with state agencies and encourage them to provide input on the issues. She noted that the governor established ethics officer positions and that action prompted more inquiries. She suggested that staff conduct a public meeting prior to the December Commission meeting and report to the Commission in December, giving the Commission time to develop a legislative proposal for the next legislative session should the Commission choose to do so.

Chairman Getman stated that the statistics gleaned from the surveys was astonishing, citing only 4% of state filing officers are aware of the FPPC's recommended procedures for forwarding a referral to the Enforcement Division. She observed that there may be many nonfilers of whom the FPPC is not even aware because those filing officers do not report them. She recommended that the FPPC work on ways to resolve this major problem.

Ms. Menchaca stated that project A.6 related to the development of model disclosure categories that would assist agencies through their amendment and review process. Staff has attached guidelines that could be included when staff sends notifications to agencies as they conduct their biennial review of their conflict of interest codes. She noted that there needs to be a process built into the program approving the guidelines as the law changes or as a need arises for refinement to the language. Staff suggested that the Executive Director have the authority to approve subsequent modifications to the language.

In response to a question, Ms. Menchaca stated that the Executive Director currently reviews the state agency conflict of interest codes and seemed like the appropriate person to make subsequent modifications, unless the Commissioners would rather review the model disclosure categories themselves.

Chairman Getman stated that the model code was adopted by regulation. She noted that the model disclosure categories are not part of a regulation, and questioned what they were.

Ms. Menchaca responded that the model disclosure categories were meant to serve as guidelines and intended to assist agencies in developing language for their conflict of interest codes. She noted that people in agencies may not be familiar with the PRA, and that this language could help them. She proposed that the information be made available on the FPPC web site.

Ms. Cassady pointed out that the FPPC approves all state agency codes. Technical Assistance Division contacts new state agencies, and the proposed disclosure categories would be supplied to them as they develop their codes. Additionally, the model disclosure categories would be sent out with the biennual code review notices.

Chairman Getman stated that she believed the model disclosure categories should be approved by the Commission, at least prior to their being sent out with the biennual notices.

Ms. Menchaca stated that project B.2 relates to the definition of "investment." She reported that staff has been unable to dedicate resources to this project, but noted that it is an important issue and that staff hopes to get legal training relating to investments to help them with this project. She asked whether the Commission wanted staff to continue working on this project.

Chairman Getman reported that the University of California at Berkeley has offered to allow a staff member to attend a financial investments class at the Haas School of Business at no charge. A staff member will be attending the course, and she thanked the University for their generosity.

Commissioner Swanson suggested that a volunteer from the investment community would make a valuable participant in the process. She agreed that investors often have no control over the investments because someone else handles their investments for them, and believed the issue should be clarified.

There was no objection from the Commissioners to approving the model disclosure categories.

There was no objection from the Commission to continuing with the investment project and the legislative proposal on the filing officer duties.

Ms. Menchaca clarified that staff began to review the possibility of model disclosure categories for local agencies, and asked whether the Commission wanted staff to continue with that effort, in addition to the rest of the project.

Chairman Getman responded that the local issue should be reviewed after the rest of the project was done if staff resources were available at that point.

Commissioner Swanson asked how staff selected the outreach summaries that were reviewed.

Ms. Cassady responded that she believed staff reviewed every outreach report for every state and local agency they visited over the last 1 1/2 years.

<u>Item #5.</u> Regulation Calendar for the Year 2003: Setting of Prioritites and Changes to the Adoption Process.

Chairman Getman stated that this would be the initial discussion of the 2003 priorities and that the actual calendar would incorporate Commission comments and would be considered for adoption at the December meeting.

Assistant General Counsel John Wallace explained that the staff memo outlined their prioritization of proposed projects for the next calendar year for the Commission's approval. Appendix 1 of the memo included a chart indicating the largest number of projects that staff believed could be calendared, and included only those projects that staff considered the highest priority of those listed in the memo.

Mr. Wallace outlined the FPPC's current regulatory process, noting that it consisted of an Interested Persons meeting, a pre-notice hearing, and an adoption hearing, and noted that difficult issues often result in multiple meetings. He explained that the Commission has considered other processes, and that staff was encouraging the Commission to consider eliminating some of those meetings in an effort to deal with anticipated fiscal restraints. Noncontroversial items, such as the technical cleanup packet, may only need to be noticed for 30 days with the Office of Administrative Law (OAL), noticed with the Commission's agenda materials under the Bagley-Keene Act, and adopted at that meeting. If additional comments or concerns arise at the meeting, the Commission could then have an additional meeting or direct staff to have an Interested Persons meeting. Most other regulations could have a prenotice and an adoption hearing.

Mr. Wallace stated that the Interested Persons meetings are useful primarily for very controversial items, and staff has found that some of those meetings were conducted unnecessarily. He presented examples of Interested Persons meetings that were attended by only one person, and noted that person was someone staff had already been working with on the projects. Staff requested that the Commission grant them discretion to determine how many meetings they believed would be necessary, noting that staff would then present a calendar for the Commission's consideration at the December 2002 meeting.

Commissioner Swanson noted that the proposal in Appendix 2 was very similar to how city governments work, and believed that the FPPC may be overzealous in trying to get input. With shrinking resources, she favored the staff proposal. However, she believed regulation 18703.3, regarding the *Hanko* opinion, to be an important issue that should be considered earlier in the year.

Mr. Wallace explained that staff could move the project to an earlier date.

In response to a question, Ms. Menchaca stated that staff had been notified that the *Hanko* opinion will be challenged in some manner, and that the assumption was that that the FPPC would be sued.

Chairman Getman suggested that it might be better to wait for a court decision if the FPPC is sued over the validity of the opinion. Absent a lawsuit, she had no objection to moving the regulation to an earlier date on the calendar.

Chairman Getman observed that the proposal outlined in Appendix 2 received grave objections when it was first brought to the Commission in 1999, but noted that it was consistent with the way most agencies did their rulemaking. She explained that she liked the proposal because it encouraged written comments submitted prior to a meeting, providing the Commissioners the opportunity to give the comments more thorough consideration than oral testimony given during a meeting. Additionally, written comments help create a much better rulemaking file.

Commissioner Swanson noted that the comments need to be received by the Commissioners in a more timely manner than they are currently, noting that she received faxes for a meeting upon

arriving home after that meeting. She encouraged the public to send their comment letters in earlier so that they can be considered.

Commissioner Knox asked how much time would be saved by eliminating I.P. meetings, noting that there would still be two public considerations of the regulations.

Mr. Wallace responded that the proposal in Appendix 2 could force more work at the front end of the project rather than the tail end. Staff recommended a more flexible process that recognized certain regulations would need additional meetings.

Commissioner Swanson supported a more flexible approach.

Commissioner Knox stated that the input from the regulated community was very useful.

Chairman Getman agreed, and noted that it would be even more useful if it were provided to the Commission earlier. She did not want to discourage public participation at the meetings, noting that it, too, was key.

Ms. Menchaca observed that, if a second adoption hearing were necessary, this would still allow the Commission to close the record before the meeting at which the regulation would be adopted.

Commissioner Knox noted that the Commission would then discuss the proposed regulation among themselves at an additional adoption hearing, without additional input from the public.

Ms. Menchaca agreed.

Chairman Getman stated that there was a consensus to develop a process that would provide flexibility.

Ms. Menchaca noted that it would require a regulatory change.

Mr. Wallace clarified that the regulatory change would be required if the Commission wanted to use the process outlined in Appendix 2. A more flexible approach that reduced meetings might be possible without a regulatory change.

Mr. Wallace asked whether the Commission agreed with staff's proposed priorities.

Chairman Getman clarified that the CalPERS Election Reporting proposal would be brought to the Commission only if their litigation ends.

Ms. Menchaca agreed.

Colleen McAndrews, of Bell, McAndrews, Hiltachk and Davidian, suggested that the Commission consider amending regulation 18116. She noted that she wrote letters in March and August, 2002, to persuade the Commission to consider amending the regulation prior to the November 2002 election. The proposed calendar would not offer any relief in the spring

elections, and filing officers would have to work most of the spring weekends to fulfill the filing obligations of their clients. She suggested that the current Commission should consider the issue rather than let it wait for the next Commission, since the current Commission understood the issues involved. She observed that Commissioners with the FPPC have often stated that their goal is to make the filing process less burdensome on treasurers, and her proposal would relieve their burden substantially. She believed there would be great support within the regulated community for her proposal, and noted that she provided a draft regulation.

In response to a question, Ms. McAndrews stated that the Commission granted an exception for weekend late reporting to people in the 90-day period that Proposition 34 created. She suggested that the next-business-day general rule be in place for the first and second weekend, and that the final weekend before the election retain the 24-hour rule. An amendment to the regulation should recognize that the final weekend before an election is important and reports should be filed on that weekend. If contributions were not reported right away, the media and the opponents would not learn about the contributions until after the election. She believed her proposal would allow plenty of time for the media and opponents to expose any noteworthy contributions, with no loss of public disclosure.

Ms. McAndrews explained that she discussed this issue with other members of the regulated community and everyone supports it as a common-sense reduction of the burden.

In response to a question, Ms. McAndrews explained that the municipal elections would be held in March, April, May and June 2003.

Mr. Wallace stated that the regulation is currently scheduled to be adopted in June 2003.

Chairman Getman noted that the Commission unanimously agreed not to change the general election rules in a manner that would make them different from the rules of the primary election because it would create confusion for the regulated community. She did not see how the regulation could be adopted and disseminated in time for the March elections, so there would be some problem no matter what the Commission did with the calendar.

Ms. McAndrews pointed out that the confusion would only result in a report being filed unnecessarily. Hopefully, she noted, the FPPC would notify everyone of the change.

Chairman Getman responded that it would be a big project to notify everyone.

Ms. Menchaca noted that staff needed time to properly analyze the proposal. She was concerned that the legislative history might not allow for one particular weekend to be treated differently than other weekends. Staff would need to conduct research to make sure that the Commission had the authority to make that regulatory change. Scheduling an April 2003 pre-notice discussion should allow staff the necessary time for that research. She noted that the staff was faced with a number of other regulations that needed to be addressed early in the year too.

Commissioner Swanson stated that Ms. McAndrews' request was reasonable. She believed that it appeared to be a beneficial proposal and that it would be appropriate to research the proposal.

She believed that a recommendation on the matter should not be delayed. Commissioner Swanson agreed that it would be welcomed by the regulated community, but noted that the Commission must provide the contribution information to the public.

Ms. Menchaca stated that staff intended to include the project on the regulatory calendar, and asked the Commission when it should be calendared.

Commissioner Swanson responded that, with elections upcoming, the regulation should be studied soon.

Chairman Getman suggested that staff try to move the regulation up on the calendar. She noted that no February meeting was currently scheduled, but that the Commission could consider the regulation at a February meeting should they decide to have one.

Ms. Menchaca noted that staff could also move another project back on the calendar in order to fit this one in.

Chairman Getman stated that the calendar would be brought back to the Commission in December 2002 for adoption.

Ms. Menchaca pointed out that the items shown as third and fourth priority items on the staff memo would not be included in the December considerations.

Chairman Getman announced that there would be no November meeting due to scheduling conflicts, and that the December meeting would be very long.

Item #6. Termination of Campaign Committees; Regulation 18404.1.

Chairman Getman reported that this item was included for informational purposes.

Commissioner Swanson suggested that it might be useful to utilize the free access to radio and the press for public interest announcements.

Ms. Menchaca responded that staff is beginning to explore those opportunities. She explained that staff was pursuing a public service announcement in the city of Yountville's weekly publication <a href="https://example.com/The-Yountville-Weekly.com/The

Items #7, #8, #9, #10, #11, #12, #13, #14, and #15.

Commissioner Swanson moved that the enforcement items be approved.

There being no objection the following items were approved on the consent calendar.

- Item #7. In the Matter of Mark Christopher Auto Center; FPPC No. 02/424. (1 count).
- Item #8. In the Matter of 95/5, Put Your Money Where the Kids Are/Yes on Prop #223 and Kinde Durkee, FPPC No. 00/59. (2 counts.)
- Item #9. In the Matter of Children's Rights 2000 and Kinde Durkee, FPPC No. 00/60. (1 count).
- Item #10. In the Matter of Capital Pacific Holdings, Inc.; FPPC No. 02/423. (1 count.)
- Item #11. In the Matter of Recording Industry Association of America PAC, and Jennifer Bendall, FPPC No. 99/346. (1 count.)
- Item #12. In the Matter of Correctional Peace Officers Association of Santa Clara; FPPC No. 01/556. (2 counts).
- Item #13. In the Matter of BriteSmile, Inc.; FPPC No. 01/553. (5 counts.)
- <u>Item #14. In the Matter of Affiliated Community Healthcare Physicians; FPPC No. 01/551.</u> (6 counts.)

Item #15. Failure to Timely File Late Contribution Reports - Proactive Program.

- a. In the Matter of Graniterock, FPPC No. 2002-706. (1 count)
- b. <u>In the Matter of Balfour Beatty Construction, Inc., FPPC No. 2002-699.</u> (3 counts.)
- c. In the Matter of Dennis A. Tito, FPPC No. 2002-720. (one count.)
- d. In the Matter of Douglas Bosco, FPPC No. 2002-700. (2 counts.)
- e. In the Matter of Ronald N. Tutor, FPPC No. 2002-721. (1 count.)

Item #16. Executive Director's Report

Chairman Getman explained that the Executive Director's report included an update on the budget situation, adding that staff did not know yet what the final budget would be for the 02/03 and 03/04 fiscal years. She noted the Commission's appreciation for efforts being made by Scott Hallabrin, from the Assembly Ethics Committee; the California Political Attorney's Association; and the League of California Cities to assist the FPPC in dealing with the proposed budget cuts.

Item #17. Legislative Report.

The Legislative Report was taken under advisement.

Item #18. Litigation Report.

Senior Commission Counsel Larry Woodlock reported that staff received an injunction from the court in the *Levine et al. v. FPPC* case and that there was a question as to whether to file an appeal in the case.

Chairman Getman stated that Judge Karlton issued the decision ruling against the FPPC and granting the preliminary injunction. The FPPC is now precluded from enforcing the provisions of the slate mail disclosure statute but only with regard to the plaintiffs in the lawsuit. The Commission would consider in closed session whether to appeal.

| The meeting adjourned at 12:10 p.m. | |
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| Dated: December 13, 2002 | |
| Respectfully submitted, | |
| | |
| Sandra A. Johnson | |
| Executive Secretary | Approved by: |
| | |
| | Chairman Getman |